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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

20 ROBERT HEATH, on behalf of himself,
21 and

22 | CHERYL FILLEKES, on behalf of herself
23 | and others similarly situated.

24 Plaintiffs,

25

26 GOOGLE LLC, a Delaware limited liability
27 company,

28 | Defendant.

Case No. 5:15-cv-01824-BLF

**DEFENDANT GOOGLE LLC'S MOTION
FOR SUMMARY JUDGMENT AS TO
CLAIMS OF PLAINTIFF ROBERT HEATH**

Date: December 20, 2018
Time: 9:00 a.m.
Dept.: Courtroom 3
Judge: Hon. Beth Labson Freeman

Complaint Filed: April 22, 2015
Trial Date: April 1, 2019

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

2 | TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that on December 20, 2018, at 9:00 a.m., or as soon thereafter as counsel
4 may be heard in Courtroom 3, 5th Floor of the above-titled court, located at 280 South 1st Street,
5 San Jose, California, 95113, Defendant Google LLC (“Google”) will, and hereby does, move this
6 Court for an order granting summary judgment in Google’s favor against Plaintiff Robert Heath.

7 The grounds for Google’s summary judgment motion are that Google has shown there is no
8 genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ.
9 Proc. 56(c). As the moving party, Google has met its burden of showing the absence of evidence
10 to support Heath’s *prima facie* claims of age discrimination under the Fair Employment and
11 Housing Act and/or the Age Discrimination in Employment Act, nor any material dispute of fact
12 sufficient to create a triable issue of age discrimination under either law. Google is entitled to
13 summary judgment because Heath lacks evidence sufficient to create a genuine issue of material
14 fact on these claims. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citing
15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
16 242, 250, 255 (1986).

17 Google’s Motion for Summary Judgment is based on this Notice of Motion and Motion, the
18 Memorandum of Law in support thereof, the Declaration of Elizabeth A. Falcone and exhibits
19 attached thereto, the Declaration of Brian Ong, all filed concurrently herewith, the pleadings on file
20 in this action, and such arguments and admissible evidence as may be presented at the time of
21 hearing.

22 | DATED: November 15, 2018

OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.

By: s/ Elizabeth A. Falcone
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1 **I. INTRODUCTION**

2 In 2011, Defendant Google LLC invited Plaintiff Robert Heath, then 60 years old, to
3 interview with it for the ***third time*** for a software engineer (“SWE”) position. On all three
4 occasions, Heath was over age 40. On February 8, 2011, Google conducted a Technical Phone
5 Screen (“TPS”) of Heath. According to Heath, the interviewer, Frank Tang, lacked the necessary
6 English proficiency to properly conduct the interview, which compounded other snags in the
7 process, including what Heath believed was a lousy phone connection and Tang’s lateness to the
8 interview. Rather than conclude that these irregularities were just bad luck or that Tang was not a
9 strong interviewer, Heath concluded that his recruitment by Google was a ploy to create the
10 appearance that skilled STEM workers are not available in the U.S. to support Google’s (supposed)
11 political agenda in favor of the issuance of more H1-B visas. Heath then went on a screed against
12 Google and Tang, filing agency charges and publicly posting his displeasure on various websites,
13 complete with repeated references to his conclusion that Tang was from “Red China.” The truth is,
14 Tang concluded Heath performed poorly. That is the only reason Heath did not proceed to the next
15 step in Google’s interview process. Even if Heath were correct that Tang failed to properly assess
16 Heath’s skill as a SWE and that the interview was hampered by communication and technological
17 challenges, that does not show intentional age discrimination, which is the theory on which Heath
18 now proceeds. There are no facts on which a jury could possibly conclude that Heath’s rejection
19 resulted from age bias. Summary judgment should be granted.

20 **II. UNDISPUTED MATERIAL FACTS**

21 **A. Google’s Non-Discrimination Policy and Hiring Process for SWEs**

22 Google policy clearly prohibits age discrimination, and requires that all employment
23 decisions be based on each individual’s merit, qualifications, and professional competence. *See*
24 concurrently filed Declaration of Elizabeth A. Falcone in Support of Google’s Motion for
25 Summary Judgment as to Claims of Plaintiff Robert Heath (hereafter, “Falcone Decl.”), attaching
26 as Exh. 1 the Declaration of Kara Silverstein, ¶¶ 3-4, Ex. 1.¹ Its “Legal and Ethical Guidelines”
27 make clear that this policy applies to any “applicant.” *Id.* Google also trains interviewers on

28 ¹ All cited deposition testimony and exhibits are attached as exhibits to the Falcone Declaration.

conscious and unconscious bias, including instructions to avoid considering age in the hiring process. Brian Ong Dep. 76:9-18, 86:6-87:5, 101:11-102:1. Once an engineering candidate passes an initial screen by a recruiter, he or she undergoes a TPS, in which an engineer may ask the candidate to write code, formulate algorithms, or answer substantive questions. *See* Declaration of Brian Ong in Support of Google’s Motion for Summary Judgment as to Claims of Plaintiff Robert Heath (hereafter, “Ong Decl.”), ¶¶ 4-5. If the candidate passes the TPS, they may be invited to onsite interviews; if they fail, the process ends. *Id.* Google’s applicant-tracking system, gHire, has no age or birthdate information on a candidate. Ong Decl., ¶ 6.

B. Heath's Background and Credentials

10 Heath describes himself as having “extensive work experience in information technology,
11 including software engineer positions.” Dkt. 218, ¶ 29. He earned a B.S. in computer science from
12 North Carolina State University, graduating in 1978, and states he has “over 32-years of post-
13 college jobs.” Pl. Dep. 52:11-16, 55:11-13, Dkt. 218, ¶ 30. He was born [REDACTED]. Pl.
14 Dep. 35:3-5. At the time of the interview relevant to this lawsuit, he resided in Delray Beach,
15 Florida. Pl. Dep. 41:1-19.

C. 2007 & 2008: Google Solicits Heath to Interview; He Fails a TPS

17 In 2007, Google contacted Heath (then roughly age [REDACTED] and conducted a TPS of him
18 for a job in Santa Monica. Pl. Dep. 105:2-24, 106:10-12, 107:7-12. Heath recalls being asked
19 during the 2007 TPS what project in his past he was most proud of; the rest of the interview “is
20 kind of vague” to Heath, though he recalls “some very abstract, esoteric problems.” Pl. Dep.
21 106:14-107:4, 107:13-16. While Heath found the 2007 interviewer “very charming” and “enjoyed
22 talking to” him, Heath found fault with the interview because he “wasn’t able to explain all of the
23 other projects” he had worked on during his career. Pl. Dep. 108:6-13, 108:19-109:11. He
24 believes that “younger workers . . . only have one or two projects,” but older workers “probably
25 have worked on dozens of projects,” and Google “would be better able to understand [his]
26 qualifications” if its interview process provided him with more time to expound on his job history.
27 Pl. Dep. 115:9-116:2. According to Heath, he had a “wealth of knowledge” that he was “never
28 given a chance to explain,” which he believes is “unfair to older workers.” Pl. Dep. 118:8-11,

1 118:20-119:2. Other than not being able to talk about more projects, there was nothing else about
2 his 2007 TPS that Heath thought suggested discrimination. Pl. Dep. 109:12-15. Heath did not get
3 the job, nor did Google invite him to proceed with the interview process beyond the TPS. Pl. Dep.
4 110:10-15. He did not file a complaint or charge of discrimination. Pl. Dep. 110:8-9.

5 In May 2008, a Google recruiter contacted Heath [REDACTED] to ask if he was interested in
6 another TPS for a SWE job. Chun Dep. Ex. 1, pg. 6. When Heath called the recruiter to discuss
7 scheduling a TPS, the recruiter realized that “Robert” Heath is the same person as “Bob” Heath
8 who had performed poorly on a TPS in 2007. *Id.* Heath grew [REDACTED] with the recruiter on
9 the call, and a TPS was not scheduled. *Id.* Like the year before, Heath did not file a charge or
10 complaint of discrimination. Pl. Dep. 114:6-8.

11 **D. February 2011: Google Approaches Heath a Third Time When He Is [REDACTED]**

12 Google contacted Heath again in February 2011, when he was [REDACTED] Pl. Dep.
13 124:19-125:1, 125:21-126:1, 129:15-19. Specifically, Google Recruiter Sam Chun emailed Heath
14 and told him that Google was “looking for the most talented and brightest software engineers,” and
15 asked if he was interested in applying; Heath responded “of course.” Pl. Dep. 126:2-19, Dkt. 218,
16 ¶ 33. Heath and Chun also spoke on the phone, and Heath found Chun “to be a very pleasant
17 person.” Pl. Dep. 128:25-129:6. He told Chun he had “a lot of experience with Java, C++,” and
18 mentioned his certifications in those languages. Pl. Dep. 128:9-22. Heath believes he “probably”
19 told Chun that he had 30 years of experience. Pl. Dep. 129:12-14. Chun said, “Well, your answers
20 are good. Let’s schedule a TPS.” Pl. Dep. 128:1-3. Despite the praise in his email to Heath, Chun
21 [REDACTED]. Chun Dep.
22 27:24-28:7, 28:19-29:22. Chun’s practice as a recruiter was to [REDACTED]
23 [REDACTED] Chun Dep. 64:11-
24 10.

25 Chun advised Heath he would need to be at a computer with an Internet connection for the
26 TPS, and that he was required to install Google Docs to participate. Pl. Dep. 135:14-16, 134:25-
27 135:2. Chun also suggested to Heath that he “needed to study,” and Heath recalls thinking, “What
28 should I study?” Pl. Dep. 135:3-12. According to Heath, he can pick up a technology he used “10

1 years ago" if he is "exposed to it for a week or two"; this type of study will bring him "current
2 again." Pl. Dep. 135:3-12. The TPS was set for February 8, 2011. Pl. Dep. 136:4-11.

3 **E. February 8, 2011: Google Interviewer Frank Tang Conducts a TPS of Heath;**
4 **Various Communication Challenges Arise and Tang Rates Heath Poorly.**

5 Google assigned Frank Tang to conduct the 2011 TPS. Pl. Dep. 142:11-16. Tang himself
6 was born [REDACTED] old at the time of the TPS. Tang Dep. 24:23-24.
7 On February 8, 2011, the day of the TPS, Tang was 10 minutes late. Pl. Dep. 136:17-139:3. When
8 Tang "came on the phone," Heath concluded that Tang "didn't speak English well," and it sounded
9 to Heath as though Tang was using a speaker phone. Pl. Dep. 137:14-19. Tang first asked Heath
10 how Heath could "help Google in [its] business," and Heath "explained to him [his] project work in
11 writing simulation models for 486 processors." Pl. Dep. 137:14-138:4. When Heath tried to say
12 something else, Tang interrupted and said, "You've already answered the question." Pl. Dep.
13 138:6-12. According to Heath, he "could barely understand [Tang]" and believes Tang "could
14 barely understand" him, because Tang was "constantly interrupting [Heath to ask him] to repeat
15 himself." Pl. Dep. 138:15-19.

16 Tang asked Heath two other questions, first to calculate the amount of memory required for
17 a particular task, and then to write an algorithm. Pl. Dep. 138:20-139:17. Although Heath had just
18 two minutes to do the algorithm question, he "came up with the answer." Pl. Dep. 139:17.
19 According to Heath, Tang had not logged into Google Docs and asked Heath to read his answer
20 aloud. Pl. Dep. 139:18-140:22. Heath asked Tang to use Google Docs or to allow Heath to email
21 the document to him, but Tang refused. Pl. Dep. 140:17-141:1. Over the phone, Heath claimed he
22 heard a knock on the door of Tang's conference room. Pl. Dep. 141:2-14. Heath understood that
23 Tang's conference room reservation had run out, ending the TPS. Pl. Dep. 137:4-13. Heath
24 remembers nothing else about the 2011 TPS. Pl. Dep. 141:13-14. He never had any further
25 communications with Tang. Pl. Dep. 143:17-21.

26 Tang entered feedback on Heath's TPS into gHire that same day, scoring him a [REDACTED] on a 4.0
27 scale. Tang Dep. Ex. 8; Ong Decl., ¶ 7, Ex. 1. In particular, Tang criticized Heath's answer on the
28 memory question, writing [REDACTED] in his narrative feedback. *Id.* On the algorithm, Tang

1 described Heath's performance as [REDACTED] but recommended Heath not be brought for an
2 onsite interview, writing that he did not [REDACTED]" *Id.*

3 **F. February 10, 2011: Heath Complains to Chun About the TPS and Tang**

4 Heath called Chun to tell him about his difficulties communicating with Tang. Pl. Dep.
5 162:21-163:11. Chun told him he would look into it, and Heath felt Chun "sympathized with [his]
6 situation." Pl. Dep. 162:7-11. On February 10, 2011, two days after the TPS, Chun emailed Heath
7 and advised him that, "based on the feedback" from Tang, Heath would not continue to the next
8 step in the interview process. Pl. Dep. Ex. 3. Heath responded by sending an email with the
9 following opening line: "May I suggest in the future that when you conduct an interview with your
10 candidates, that you do so with an interviewer that has a solid command of the language being used
11 by the candidate." *Id.* Chun entered a note in Google's records stating that Heath had "[REDACTED]
12 [REDACTED] Chun Dep. 52:6-10, Ex. 1, pg. 3. Heath had no
13 further communication with anyone at Google about his 2011 TPS. Pl. Dep. 163:23-164:5, 169:9-
14 13. He has not applied for or expressed interest in any position at Google since February 2011. Pl.
15 Dep. 166:17-19.

16 **G. Heath Files Charges With the EEOC and DFEH, and Drafts Correspondence**
17 **Excoriating Tang Based on His Perceived Nationality**

18 On June 13, 2011, Heath dual-filed a charge with the EEOC and the DFEH alleging age
19 discrimination in hiring. Pl. Dep. 170:2-18, Ex. 4. In connection with preparing to pursue those
20 claims, Heath "drafted up a letter" dated February 14, 2011 (four days after Google rejected him).
21 Pl. Dep. 172:13-174:19, Ex. 5. In that letter, Heath refers to Tang as "Chinese and barely fluent in
22 English," and decried Google as "dependent on the employment of immigrants from India and
23 Communist China," and "unwilling to hire US workers." Pl. Dep. Ex. 5. He also posted comments
24 about his Google interview on a website called "democraticunderdog.com," in which forum he
25 referred to Tang as being "from Red China." Pl. Dep. Ex. 8, pg. 2; *see also id.* at p. 21 ("maybe
26 they could tell us to take a course in Mandarin so we can pass the job interview with their workers
27 from Red China."). Heath testified that he believes that Google is the "leader" in a problem of
28 "epidemic proportions" in which US-born STEM workers are "taunted, mocked, and smeared." Pl.

1 Dep. 212:12-215:9. He believes Google offered him the 2011 TPS as “a prop” to “demonstrate
2 that there is a shortage of US workers, to build public support for expanding the H-1B visa
3 program.” Pl. Dep. 167:3-10.

4 In this suit, Heath brings two claims: (1) disparate treatment under the Age Discrimination
5 in Employment Act (ADEA); and (2) intentional discrimination under the California Fair
6 Employment and Housing Act (FEHA). Dkt. 218, *passim*.

7 **III. LEGAL ARGUMENT**

8 **A. Summary Judgment Standard**

9 A court should grant summary judgment when the moving party “show[s] that there is no
10 genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” Fed.
11 R. Civ. P. 56(c). Where, as here, the nonmoving party has the burden of proof at trial, “the movant
12 can prevail merely by pointing out that there is an absence of evidence to support the nonmoving
13 party’s case.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (*citing Celotex*
14 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the moving party meets its initial burden, the
15 opposing party must then set out specific facts showing a genuine issue for trial in order to defeat
16 the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see* Fed. R. Civ. P. 56(c),
17 (e).

18 **B. The *Prima Facie* Elements of Age Discrimination and the Burden-Shifting**
19 **Analysis Applicable Under the FEHA and the ADEA**

20 While the *prima facie* case for a failure to hire claim is similar under the ADEA and the
21 FEHA, it is not identical. Under the FEHA, to prove intentional discrimination in a failure-to-hire
22 case, a plaintiff must provide evidence that (1) he is a member of a protected class; (2) he was
23 qualified for the position he sought; (3) he suffered an adverse employment action (a failure to
24 hire); and (4) some other circumstance suggests discriminatory motive. *Abed v. Western Dental*
25 *Servs.*, 23 Cal. App. 5th 726, 736 (2018).

26 A *prima facie* case under the ADEA requires more than this. Specifically, to show
27 intentional discrimination under the ADEA, Heath must offer admissible evidence that a younger
28 person with similar qualifications received the position. *Cotton v. City of Alameda*, 812 F.2d 1245,

1 1248 (9th Cir. 1987). Further, Heath cannot prevail on his ADEA claim unless he can show “but
2 for” causation as to the decision not to hire him. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177
3 (2009).

4 If Heath can state a *prima facie* case, “the burden shifts to [Google] to [articulate a]
5 legitimate nondiscriminatory reason for its employment decision.” *Arteaga v. Brink’s, Inc.*, 163
6 Cal. App. 4th 327, 342–343 (2008). If Google proffers a legitimate reason for its decisions, Heath
7 must show that reason is a pretext for age discrimination, either directly by showing that a
8 discriminatory reason more likely motivated the employer or indirectly by showing that Google’s
9 explanation is unworthy of credence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,
10 142 (2000); *EEOC v. The Boeing Company*, 577 F.3d 1044, 1049 (9th Cir. 2009); *Guz v. Bechtel
11 Nat’l, Inc.*, 24 Cal. 4th 317, 355–56 (2000); *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th
12 52, 69 (2000). If Heath relies on circumstantial evidence to show pretext, that evidence must be
13 “specific and substantial.” *Boeing*, 577 F.3d at 1049; *see also Grant v. Tosco Refining Co., Inc.*,
14 1996 WL 590587 (N.D. Cal. 1996), *quoting Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.
15 1983). “The ultimate burden of persuasion on the issue of actual discrimination remains with the
16 plaintiff.” *Guz*, 24 Cal. 4th at 356.

17 Google does not dispute that Heath is a person over age 40, nor that it chose not to hire him.
18 It focuses its arguments on the elements of causation and pretext. There is simply no admissible
19 evidence from which a jury could conclude that (1) as required under FEHA, the circumstances
20 suggest a discriminatory motive; (2) as required by the ADEA, the but-for cause of his non-hire
21 was age discrimination; or (3) under either statute, that Google’s legitimate, non-discriminatory
22 reason for not hiring Heath is actually a pretext for discrimination. With respect to the ADEA
23 claim, Heath also cannot meet his burden on summary judgment to show that a younger person was
24 selected for the position he sought.

25 **C. Tang’s Assessment that Heath Lacked the Necessary Skill Set Is a Legitimate
26 Reason for Google’s No-Hire Decision**

27 Here, Google has articulated a clearly legitimate reason for its decision: Tang’s assessment
28 that Heath lacked the computer science skills necessary for the job. Tang Dep. Ex. 8 (scoring

1 Heath a [REDACTED] on a 4.0 scale, noting his interview answer was [REDACTED] and concluding that he
2 did not “[REDACTED]”); Ong Decl., ¶ 7 ([REDACTED]
3 [REDACTED] should not proceed further in the
4 interview process.”). It is axiomatic that an employer’s assessment that an applicant lacks the
5 requisite skills for a job qualifies as a legitimate, non-discriminatory reason for a no-hire decision.
6 See, e.g., *Finley v. Cty of Martin*, 2009 WL 5062326 (N.D. Cal. 2009). Accordingly, the burden
7 shifts back to Heath; it is one he cannot carry.

8 **D. Heath Has No Evidence Whatsoever of Causation or Pretext**

9 Pertinent to both the FEHA and the ADEA claims, Heath has testified that he has no
10 evidence of age discrimination other than his recollections of his interview and the concerns set out
11 in his February 10 email to Chun about how it was conducted. Pl. Dep. 164:6-17. In other words,
12 Heath can point to no ageist comments, no documents evidencing ageist bias, nor any other direct
13 evidence of age discrimination. To the contrary, he offers an incoherent mish-mash of speculative
14 theories for why he was not hired, including discrimination in favor of foreign applicants, that
15 Tang was supposedly from “Red China,” a poor phone connection, and a disinterest in hiring older
16 workers. Because the relevant evidence as to pretext/proof of discriminatory motive is the same on
17 both the federal and the state law claims, Google addresses these issues jointly.

18 **1. Tang’s Conduct During the TPS Was Consistent with His Ordinary
19 Practice**

20 Notably, Heath concedes that his only evidence that Tang was acting intentionally to
21 disadvantage him was that, in his view, Tang did not take steps Heath thought might eliminate
22 some of the communication problems. Pl. Dep. 162:2-19. But, there is no evidence that any action
23 or inaction by Tang was the result of age bias. Rather, Tang’s TPS of Heath was consistent with
24 his practice for conducting TPS interviews. He treated Heath no differently than other applicants,
25 whether over or under 40 years old.

26 Specifically, as to the use of a speakerphone, Tang testified that he had [REDACTED]
27 [REDACTED] when conducting telephone interviews for Google. Tang Dep. 53:20-54:8. He also
28 testified that he does not remember if he brought [REDACTED]

1 [REDACTED] Tang Dep. 70:2-6, 107:5-9. He explained
2 that his practice is not [REDACTED] for two reasons. First, Tang
3 found through experience that some candidates [REDACTED]
4 [REDACTED] Tang Dep. 72:17-
5 21. Second, Tang had a negative experience where a candidate somehow [REDACTED]
6 [REDACTED] Tang Dep.
7 73:22-74:11. For these reasons, Tang asks all candidates to do what Heath did: Write the code and
8 then [REDACTED] Tang. Dep. 76:24-77:10. [REDACTED]
9 [REDACTED] *Id.* In short,
10 even if Heath disagrees with how Tang conducts interviews, because Tang's process was consistent
11 with how he screened other candidates, no inference of discrimination arises. *See Morgan*, 88 Cal.
12 App. 4th at 72 (hiring manager's alleged rudeness to a would-be applicant was not evidence of an
13 illegal motive for a failure to hire claim).

14 **2. Tang's Conclusions About Heath, Even if Mistaken, Were Non-**
15 **Discriminatory.**

16 Heath may argue that (1) a variant of the memory question had been banned by Google,² or
17 (2) Heath's answer to the memory question was correct and Tang simply misheard him due to the
18 language barrier and the poor phone connection. Neither argument defeats summary judgment.

19 First, Heath's argument that Google banned the memory question is a red herring. Tang
20 testified that Google banned a variant of the question [REDACTED]
21 [REDACTED] Tang Dep. 46:1-25. In other words, [REDACTED] undermined the question's
22 utility in sorting candidates. Google banned the question not because it was substantively improper
23 or reflective of age discrimination, but because its [REDACTED]

24 _____
25 ² Heath cannot argue that the question was not job-related. He admits that SWEs need to be able to
26 accurately calculate memory and storage, because it can cause problems if the requirements of the
27 end product software exceed the estimate of memory or storage needed. Pl. Dep. 158:11-159:13.
28 This type of mistake can affect other systems, squeezing them out of the memory. Pl. Dep. 159:22-
160:9.

1 [REDACTED] This cannot have
2 possibly disadvantaged Heath. Indeed, if anything he had an *advantage*.

3 Heath may also argue that he got the answer right and Tang was wrong in concluding he
4 had given a “[REDACTED] answer. Heath admits the correct response to that question is that the
5 necessary memory was “more than two bites.” Pl. Dep. 151:24-152:18. Tang’s notes show that he
6 recorded Heath’s answer as indicating two bites were sufficient. This cannot raise a triable issue of
7 pretext, however, because Heath admitted at deposition that Tang may have thought he heard
8 Heath answer “two bites.” Pl. Dep. 152:22-153:1. Heath testified that he believes that Tang may
9 have misheard him because “[Tang] doesn’t speak English precisely” and “he was talking on [a
10 speakerphone] that had poor communication.” Pl. Dep. 153:2-15.

11 But even if Tang did mishear Heath, this mistake would not be sufficient to create a triable
12 issue of intentional age discrimination because employers are allowed to make mistakes or bad
13 decisions without running afoul of anti-discrimination laws. Indeed, “[i]t is the employer’s honest
14 belief in the stated reasons for [the alleged adverse action] and not the objective truth or falsity of
15 the underlying facts that is at issue in a discrimination case.” *King v. United Parcel Service*, 152
16 Cal. App. 4th 426, 436 (2007); *see also, e.g., Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,
17 1063 (9th Cir. 2002); *Guz*, 24 Cal. 4th at 358 (“[I]f nondiscriminatory, [an employer’s] true reasons
18 need not necessarily have been wise or *correct*.”); *Horn v. Cushman & Wakefield Western, Inc.*, 72
19 Cal. App. 4th 798, 806-807 (1999) (To establish pretext, “[t]he employee cannot simply show the
20 employer’s decision was wrong, mistaken, or unwise.”); *Hersant v. Department of Social Services*,
21 57 Cal. App. 4th 997, 1005 (1997) (“It is not enough for the employee simply to raise triable issues
22 of fact concerning whether the employer’s reasons for taking the adverse action were sound. What
23 the employee has brought is not an action for general unfairness but for [] discrimination.”).

24 In short, the undisputed evidence is that Google did not hire Heath because Tang concluded
25 that he was not qualified based on Heath’s TPS performance, which is a legitimate, non-
26 discriminatory reason to reject a candidate. None of Heath’s counter arguments are sufficient, as a
27 matter of law, to raise a triable issue of pretext.

28

1 3. Heath Cannot Establish His Qualifications Through His Own Personal
2 Opinion or Comments By a Recruiter

3 Heath likely will take issue with Tang's conclusion that Heath was not qualified for a SWE
4 position at Google. But an applicant cannot avoid summary judgment by challenging an
5 employer's business judgment about the applicant's qualifications, so long as the decision was not
6 driven by a discriminatory motive. For instance, in *Grant*, an ADEA hiring case, this Court
7 explained, "[e]ven were plaintiff more technically qualified than either [of the other two
8 candidates], ***the ADEA does not make it unlawful for an employer to do a poor job of selecting***
9 ***employees***...the Court will not second guess the decision made by defendant unless plaintiff shows
10 that defendant discriminated on the basis of age or race." 1996 WL 590587 at *6 (internal citations
11 omitted; emphasis added).

12 To survive summary judgment, Heath must do more than tout his qualifications. Courts
13 routinely hold that a plaintiff's own opinion that he is a superior candidate to others does not
14 constitute evidence of pretext. *See, e.g., Lee v. Solano County Probation Dept.*, 2006 WL 495996
15 at *8 (E.D. Cal. 2006) (plaintiff "has not offered evidence, other than his own subjective opinion,
16 that he was more qualified for the position than the two persons ultimately selected. Plaintiff has
17 provided no affidavits or declarations ... other than his bald assertion that his 18 years in the field
18 of probation made him more qualified or that his answers to the written hypothetical were
19 superior."). And although the recruiter found that Heath's resume presented qualifications
20 sufficient to warrant a TPS, the mere fact that Heath has credentials he can list on a resume does
21 not mean he performed well on the TPS.

22 Heath may argue that, because Chun commented that Heath was a strong candidate after
23 reviewing his resume, Tang's conclusion that Heath did not understand basic computer science
24 must be pretextual. But this argument is incorrect. First, the roles of Chun and Tang were
25 different: Chun was a recruiter, while Tang was the engineer and subject-matter expert tasked with
26 conducting the TPS. Chun testified that he [REDACTED]
27 [REDACTED]
28 [REDACTED]

Chun Dep. 27:24-28:7, 28:19-29:22.

1 Moreover, Chun's preliminary assessment of Heath's resume is just that: preliminary, and subject
2 to change. In *Cramblett v. McHugh*, 2014 WL 2093600, *12 (D. Or. May 19, 2014), the district
3 court evaluated an ADEA failure to hire claim where the plaintiff pointed to the employer's
4 favorable assessment of the plaintiff's resume as somehow showing bias when a subsequent
5 interview did not go well. The district court rejected the claim, stating as follows: "[T]he more
6 comprehensive selection process conducted by [the in-person interviewer] appears to constitute the
7 appropriate conclusion of the initial selection process begun by [the resume reviewer]. [The
8 interviewer] also viewed [the plaintiff] as a highly qualified candidate based on his resume, but the
9 additional step of an interview revealed information that was not gleanable from the simple resume
10 review." *Id.* Moreover, to establish a triable issue of pretext, it is insufficient to only present
11 evidence that the reason offered was incorrect. Heath must present ***substantial*** evidence that
12 Google's justifications were false such that "a rational inference that intentional discrimination, on
13 grounds prohibited by the statute, was the true cause of the employer's actions." *Guz*, 24 Cal.4th at
14 361. This, he cannot do.

15 **IV. CONCLUSION**

16 This is not a case of age discrimination. It is a case of a disappointed job applicant who
17 cannot accept that his interview did not go as hoped. And, while Heath may have evidence that his
18 interview did not run smoothly, that does not permit a jury to infer age discrimination. For all the
19 foregoing reasons, Google respectfully requests that the Court grant this Motion for Summary
20 Judgment and dismiss Plaintiff Robert Heath's claims with prejudice.

21 DATED: November 15, 2018

22 OGLETREE, DEAKINS, NASH, SMOAK &
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